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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-479

GEORGE BENZ & SONS,

Petitioner,

v.

EARL L. BUTZ, Secretary of Agriculture,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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September 13, 1973.

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EARL L. BUTZ, Secretary of Agriculture,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner George Benz & Sons, a Minnesota corporation, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on April 20, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, entered on April 20, 1973, is reprinted in the Appendix hereto.

A notation at the end of the opinion indicates that it is "not to be published."

The order and opinion of the United States District Court for the District of Minnesota, granting summary judgment, were entered on April 24, 1972, and are reported at 342 F.Supp. 88. They are reprinted in the Appendix hereto.

JURISDICTION

The petitioner instituted this action against the Secretary of Agriculture pursuant to 7 U.S.C. §608c (15)(B), seeking to invalidate an amendatory order that expanded a milk marketing area. The District Court, on April 24, 1972, granted summary judgment in favor of the Secretary and dismissed petitioner's complaint.

On April 20, 1973, the Eighth Circuit affirmed the District Court's action. On May 15, 1973, the Eighth Circuit denied a timely petition for rehearing *en banc*. See Appendix hereto. On timely application, Mr. Justice Blackmun on August 6, 1973, signed an order extending the time for filing this petition for *certiorari* to and including September 13, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Secretary of Agriculture conducted a referendum of dairy farmers to determine their approval or disapproval of extending the georgraphical area covered by a pre-existing milk marketing order issued under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §608c. The questions presented are:

1. Are the holding and conduct of such an amendatory referendum solely matters of the Secretary's discretion without regard to statutory standards respecting the holding and conduct of referenda?

2. Is the Secretary obligated by the Act to limit participation in such an amendatory referendum to those dairy farmers (a) who operate in the geographical area proposed to be added to the pre-existing order, and (b) who will be affected and regulated by such an extension of the pre-existing order?

3. Is the Secretary obligated by the Act to describe on the referendum ballot the specific proposal to extend the geographical area, as to which approval is sought?

4. In determining whether two-thirds of the eligible dairy farmers approve of the extension of the geographical area, does the Secretary abuse his discretion, in violation of the voting principles incorporated in the Act, in not insisting on individual voting by the affected dairy farmers and by permitting bloc voting by two large milk cooperatives representing more than 92 percent of the eligible dairy farmers?

STATUTORY PROVISIONS INVOLVED

Section 8c of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §608c:

§608c(1): The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity, or product thereof . . .

§608c(9)(B)(i): Any order issued pursuant to this section shall become effective in the event that . . . the Secretary of Agriculture determines: . . . That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored: (i) By at least two-thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement, or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order . . .

§608c(12): Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order . . . the Secretary shall consider the approval or disapproval by any cooperative association of producers . . . as the approval or disapproval of the producers who are members of . . . such cooperative association of producers.

§608c(17): The provisions of this section . . . applicable to orders shall be applicable to amendments to orders . . .

§608c(19): For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors . . . the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so . . . The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the

order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

STATEMENT OF THE CASE

The petitioner George Benz & Sons operates the Oak Grove Dairy in Norwood, Minnesota. As such, it is known as a "handler" under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §601 *et seq.*

The petitioner instituted this action in the District Court against the respondent Secretary of Agriculture pursuant to 7 U.S.C. §608c(15)(B), seeking to set aside an order of the Secretary amending Order No. 68 (7 C.F.R. 1068) which regulates the handling of milk in the Minneapolis-St. Paul marketing area. Prior to the amendment here in issue, the Minneapolis-St. Paul milk marketing area was comprised of the cities of Minneapolis and St. Paul and other specified Minnesota cities, villages and townships immediately surrounding Minneapolis in the counties of Hennepin, Anoka, Ramsey, Washington and Dakota, 7 C.F.R. 1068 (1969). The marketing order established minimum prices for milk purchased by handlers from producers and cooperatives. Two basic prices were established: one for Class I milk (fluid milk), and another for Class II milk (milk products like butter and cheese.) The price paid by the handlers varied, depending upon the proportion of their milk utilized as Class I rather than Class II, whereas the producers received a uniform blend price based upon a weighted average price for all regulated Class I and II milk sold in the month. And regardless of the location of their plants, handlers were subject to this order, with all its price regulations, if they disposed

of fifteen percent or more of their Class I milk within the defined marketing area, 7 C.F.R. 1068.9. As a handler, petitioner did not do business within that area and hence was not subject to Order No. 68.

In June of 1968, the Deputy Administrator, Consumer and Marketing Service, Department of Agriculture, gave notice of a public hearing to consider various proposed amendments to the Minneapolis-St. Paul milk marketing order (No. 68), 33 Fed. Reg. 8,462. One of the proposed amendments was to expand the geographic marketing area to 21 additional Minnesota counties and 7 Wisconsin counties.

A public hearing was held in Minneapolis pursuant to this notice. The general manager of the petitioner's Oak Grove Dairy opposed the expansion of the marketing area insofar as it would include the 11 Minnesota counties west of Minneapolis where Oak Grove sells its products. He testified further that Oak Grove was not subject to regulation under the then existing Minneapolis-St. Paul marketing order, No. 68, though it was partially regulated under the Minnesota-North Dakota milk marketing order. If these 11 Minnesota counties were to be included under Order No. 68, the Oak Grove Dairy would become regulated.

Following the hearing, the Deputy Administrator of the Consumer and Marketing Service issued a decision recommending the extension of the marketing area to the 21 proposed Minnesota counties, including the 11 to which Oak Grove had objected, and portions of three of the proposed Wisconsin counties, 33 Fed. Reg. 18,181. Oak Grove and another handler filed exceptions to the recommended decision but these were overruled. On February 27, 1969, the Under Secretary of Agriculture approved the recommended decision with modifications not here relevant. 34 Fed. Reg. 3,833.

The Under Secretary also recommended that a referendum be conducted to determine if the required two-thirds majority of the producers of milk for sale in the proposed marketing order approved the amended order, including the expansion of the covered area. The referendum was conducted in March of 1969.

Those producers deemed eligible to vote numbered approximately 4,569 and were located both in the original geographical area defined by Order No. 68 and in the expanded area proposed by the amendment to that Order. Some 542 producers in the expanded area were already subject to the original Order No. 68 since they belonged to one of two regulated cooperatives, Twin City Milk Producers Association and Lakd O'Lakes Creameries, Inc. These 542 producer votes were incorporated in the bloc votes cast by the two cooperatives on behalf of their more than 4,240 members in the original and expanded area. App. 5-6, 17,63.

While there were numerous provisions involved in the proposed amendment to Order No. 68, the referendum question put to the producers did not break down those various provisions. Nor did the question specifically relate to the most important aspect of the proposed amendment, the expansion of the geographical area. The single question put to the producers was:

> "Do you approve the issuance by the Secretary of Agriculture of the order as amended, regulating the handling of milk in the Minneapolis-St. Paul, Minnesota, marketing area?"

The voting results showed that 96.7 percent of the eligible votes cast from both the original and the expanded areas approved the issuance of the amended order, as thus put in the referendum. More specifically, the official results were (App. 28):

For approval	4,202
Against approval	143
Total votes	4,345
Votes disqualified	88
Estimated number of producers eligible to vote	4,569

No breakdown was made as to the geographical areas from which the votes were cast, as between the area defined in the original Order No. 68 and the expanded area defined in the proposed amendment. But as thus approved, the amended Order No. 68 became effective on May 1, 1969.

On June 20, 1969, the petitioner filed an administrative petition pursuant to 7 U.S.C. §608c(15)(A) seeking, *inter alia*, to eliminate the 11 Minnesota counties from the marketing area and to conduct a separate referendum of the milk producers in each of those counties on the question whether they approved the inclusion of their particular county in the marketing area of Order No. 68. The petitioner also objected to the manner in which the 1969 referendum had been conducted, particularly in that the two large milk cooperative associations had been allowed to cast the votes of all of their members as a bloc, contrary to the "one man - one vote" principle of *Reynolds v. Sims*, 377 U.S. 533 (1964) and contrary to the Equal Protection Clause of the Fourteenth Amendment. App. 19.

On January 22, 1970, the Secretary's Judicial Officer dismissed those portions of the petition that challenged the conduct of the referendum, App. 23-25. He ruled that there was no requirement of law that the referendum be restricted to the producers in the territory proposed to be added to the existing marketing area, and that bloc voting by cooperatives of their members is specifically

authorized by the Agricultural Marketing Agreement Act of 1937, as amended. On January 25, 1971, following a hearing, the Judicial Officer dismissed the remainder of the petition; he ruled that expansion of the marketing area pursuant to the amendatory order was supported by the evidence and that the evidence also established that petitioner's Oak Grove milk competed with interstate milk so as to render Oak Grove subject to the Secretary's jurisdiction. App. 34-62.

The petitioner then commenced this action in the United State District Court for the District of Minnesota on February 11, 1971. Judicial review was sought of the various administrative orders and of the conduct of the 1969 referendum, the orders allegedly not being justified by substantial evidence. A decree was sought setting aside the 1969 referendum and remanding the proceedings to the Secretary so that a new referendum could be conducted limited to individual balloting by the producers located in the counties proposed to be added to Order No. 68.

On April 25, 1972, after having held several hearings, the District Court granted the Government's motion for summary judgment. In its accompanying opinion, the District Court found that there was substantial evidence to support the amended Order No. 68 and that there was no merit to petitioner's objections to the conduct of the 1969 referendum. See Appendix hereto. On April 20, 1973, the Eighth Circuit affirmed on the basis of the District Court's opinion. See Appendix hereto. A petition for rehearing *en banc* was denied on May 15, 1973.

REASONS FOR GRANTING THE WRIT

This case raises significant and novel problems in the interpretation and application of Section 8c of the

Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §608c. Such problems are of nationwide concern, affecting as they do the procedures for amending and expanding any and all of the 62 milk marketing orders in effect throughout the United States.[1] As in *Zuber v. Allen*, 396 U.S. 168, 171 (1969), therefore, *certiorari* should here be granted to resolve these important issues of statutory construction "involved in this aspect of the administration of the federal milk regulation program."

The statutory questions that deserve full consideration and resolution by this Court may be simply stated:

> (1) WHAT IS THE STATUTORY AUTHORITY FOR CONDUCTING A REFERENDUM ON AMENDING A MILK MARKETING ORDER SO AS TO EXPAND THE GEOGRAPHICAL AREA COVERED BY THE ORDER?

It is critically relevant to note this Court's admonition in *Zuber v. Allen*, 396 U.S. at 183, that the Agricultural Marketing Agreement Act does not give to the Secretary of Agriculture "a mandate phrased in broad and permissive terms." Congress has here "spoken with particularity and provided specifically" what the Secretary may or may not do, and has emphasized a "congressional purpose to confine the boundaries of the Secretary's delegated authority." *Ibid.*

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1 "At the present time, there are 62 federal milk orders in effect. They regulate almost 80 percent of the milk eligible for fluid use in the country. These orders are proposed by dairy farmers in an area, developed by the Secretary of Agriculture on the basis of a public hearing, are made effective only after approval by producers supplying the proposed marketing area and may be voted out by producers at any time." S. Rep. No. 19-1154 (Aug. 28, 1970), 1970 U.S. Code Cong. & Admin. News, Vol. 3, 4788 at 4802 (91st Cong. 2d Sess.).

The difficulty here is that Congress has not "spoken with particularity and provided specifically" with reference to the technique for expanding the geographical scope of a pre-existing marketing order.[2] Congress has said, in §608c(9)(B), that in initially issuing a milk marketing order covering a specified area the Secretary must determine that it is approved by at least two-thirds of the dairy farmers producing milk for sale in "the production area specified" in the proposed order. Congress has further said, in §608c(19), that "in the case of an order other than an amendatory order" the means for ascertaining such approval by the farmer-producers shall be a referendum.

The question thus remains as to the nature and source of the Secretary's authority to conduct a referendum as to an amendatory order, particularly one that extends the geographic scope of federal milk controls. Does the §608c(19) referendum requirement "in the case of an order other than an amendatory order" mean that a referendum in the case of an amendatory order lies solely within the discretion and option of the Secretary, as the Government argued in the court below? And if such a referendum be deemed discretionary and optional, is the Secretary free to disregard whatever standards or conditions the Act may place on the conduct of a referendum dealing with "other than an amendatory order"? Can he simply promulgate an amendatory order without holding a referendum?[3]

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[2] The Secretary is authorized under §608c(1) to "issue, and from time to time amend, orders" regulating the handling of milk. And §608c(17) makes all the provisions of §608c generally applicable to "amendments to orders." But nothing is said specifically about referenda as to amendatory orders, or orders extending controls to new areas.

[3] Some courts have assumed, without analysis, that "amendments to marketing orders under the statute are permitted only after hearings and favorable votes by producers." *Foster v. Freeman*, 271 F. Supp. 33, 38 (S.D.N.Y. 1967).

The answers to these basic questions underlie the further statutory problems raised in this case. And they are questions that must be answered in light of the further warning in *Zuber v. Allen*, 396 U.S. at 185, that ". . . Congress was not conferring untrammeled discretion on the Secretary and authorizing him to proceed in a vacuum. This was the very evil condemned by the courts that the 1935 amendments sought to eradicate."

(2) WHAT IS THE STATUTORY AUTHORITY FOR PERMITTING THOSE PRODUCERS NOT AFFECTED BY AN AMENDATORY ORDER TO VOTE IN A REFERENDUM?

As this Court noted in *H.P. Hood & Sons v. United States*, 307 U.S. 588, 598 (1939), the Act in question "does not supply the Secretary with detailed directions as to the manner of holding a referendum. Its language is general. The Secretary 'may conduct a referendum among producers.' [§608c(19)]. What producers? Those 'engaged in the production of [milk] for sale in the marketing area . . .' [§608c(9)(B)(i)]."

Thus, assuming the Secretary may and does conduct a referendum as to an amendatory order, the next statutory question concerns the standard of eligibility for voting on a proposal to expand the geographical area of a milk marketing order. If the eligible producers are deemed to be those "engaged in the production of [milk] for sale in the marketing area specified in such . . . order," §608c(9)(B)(i), is the relevant marketing area that specified in the original order or that more limited area specified in the proposed amendment to the order? Or should the relevant area be deemed to include both the original area and the proposed additional area? And does the Secretary have untrammeled discretion to select either or both areas in which to conduct the referendum?

At least two courts of appeals have held that the choice "must be left exclusively in the hands of the Secretary" and that a decision by him to include both the original and the additional areas in the referendum must be respected. *Freeman v. Hygeia Dairy Company*, 326 F.2d 271, 273-274 (5th Cir. 1964); *Benson v. Schofield*, 236 F.2d 719 (D.C. Cir. 1956).[4] But it is questionable if such a matter must be left entirely to the judgment of the Secretary. Does not the emphasis in the *Hood* opinion on the statutory reference to "the marketing area specified in such . . . order" suggest that the Secretary is bound to select that area in which to hold the referendum? And if that be true, the question remains as to what is the specified marketing area. Is it the area specified to be added to the original area, or is it the total area under the order as amended?

If, as happened in the instant case, the producers in both the original and the new areas are allowed to vote, the producers in the original area who are already regulated will usually be able to exert their superior will against the producers in the new and often smaller area sought to be added.[5] Presumably Congress was here seeking to make the imposition of milk marketing controls dependent upon the two-thirds vote of those producers operating in the district to be affected by those controls. See *Currin v. Wallace*, 306 U.S. 1, 16 (1939). But those affected by the

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[4] While this Court denied *certiorari* in the *Benson v. Schofield* case, 352 U.S. 976 (1957), the petition for *certiorari* did not raise or pursue this voting eligibility problem arising from the area selected in which to hold the referendum. No. 595, Oct. Term 1956.

[5] While the decision was reversed on appeal (326 F.2d 271), the District Court opinion in *Hygeia Dairy Company v. Freeman*, 197 F. Supp. 876, 878 (S.D. Tex. 1961), puts the problem well:

(continued)

order amending Order No. 68 are solely those producers operating within the new area proposed to be added. And it would seem both logical and reasonable, as well as consistent with democratic voting principles, to confine the referendum to those who alone are affected by the proposed regulation. At least the expression of their approval or disapproval might aid the Secretary in making his final decision to extend the regulation to them.

The statutory problem of defining the relevant marketing area for referendum purposes is complicated in the instant case by the fact that certain producers in the proposed added area were already subject to the original Order No. 68, by virtue of their membership in the milk cooperatives. But that fact only gives an added dimension to the statutory problem. If the purpose of a referendum under this Act is to secure the views and approval of those producers hitherto unregulated by a milk marketing order, should not the referendum be limited to those producers who (a) operate within the unregulated area proposed to be added to the marketing order, and (b) have not heretofore been subject to regulation?

To so limit an amendatory referendum, of course, is not to deny the Secretary the discretion to seek the views of the producers in both areas who are already subject to regulation. But if the statutory language relative to obtaining

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5 (continued) "The question as this Court sees it is very simple. Can the Secretary dissolve an existing regulated marketing area and piece-meal add territory to it by allowing those who are already regulated, who have made their bed and are lying in it, to force their will against the producers in the new area sought to be added?

"The Court feels that this method of procedure on the part of the Secretary is tantamount to a thwarting of the will of Congress.

"An area that has never been regulated must be given the opportunity to decide on its own whether it wants to be regulated or not. Producers should also be given the opportunity to decide for themselves as to what marketing area they want to be in."

the approval of those unregulated producers in "the marketing area specified in such [amendatory] order" is to be made meaningful, a separate referendum may well be necessary to obtain the approval of two-thirds of the unregulated producers in the area proposed to be added. They alone are the ones affected by the proposed extension of the controls specified in Order No. 68.

(3) WHAT IS THE STATUTORY AUTHORITY FOR CONDUCTING A REFERENDUM THAT DOES NOT STATE THE PERTINENT QUESTION AND DOES NOT REFLECT THE VOTES OF INDIVIDUAL PRODUCERS?

The final questions raised by the referendum conducted in this case relate to the form of the ballot and the bloc voting by the two cooperatives that dominated the results.

Section 608c(19) commands the Secretary to describe "the terms and conditions of the proposed order . . . in the ballot used in the conduct of the referendum." And the Secretary's own regulations commit him to formulate "a ballot containing a description of the terms and conditions of the order." 7 Code Fed. Regs. 900.306(a)(1). The obvious question raised is whether the ballot here used complied with those requirements, a ballot that simply asked whether the voter approved "the issuance by the Secretary of Agriculture of the order as amended, regulating the handling of milk in the Minneapolis-St. Paul, Minnesota, marketing area." Where does that ballot question describe "the terms and conditions of the proposed order"? Where does that ballot question describe or even mention the proposal to expand the geographical area covered by Order No. 68?

To be sure, §608c(19) provides that the "nature, content, or extent of such description" on the ballot of the terms and conditions of the proposed order "shall not be the basis for attacking the legality of the order or any action relating thereto." But query whether Congress thereby meant to

foreclose any objection to a patently inadequate ballot description where the legality of an amendatory order is simultaneously under attack on other grounds. If such other objections were to be sustained and a new referendum ordered, §608c(19) should not be deemed an obstacle to reforming the ballot description to comply with statutory requirements.

Finally, the bloc voting by the two cooperatives in this case so completely dominated the purported results, and so completely diluted the views of the individual producer-members, as to raise a most serious statutory problem. In §608c(12), Congress clearly authorized the Secretary to consider the approval or disapproval of any cooperative association "as the approval or disapproval of the producers who are members" thereof.[6] And this Court has expressly approved such bloc voting by cooperatives. See *United States v. Rock Royal Co-operative*, 307 U.S. 533, 578 (1939); *H.P. Hood & Sons v. United States*, 307 U.S. 588, 599 (1939).

But in this case more than 92 percent of the producers deemed eligible to vote were represented by two cooperatives. In this situation it is doubtful, realistically speaking, that the affirmative bloc votes cast by two cooperatives can be said to constitute approval by the required "two-thirds of the producers . . . who . . . have been engaged, within the production area specified . . . in the production for market of [milk and milk products]." §608c(9)(B)(i). There is,

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[6] Section 608c(19) also states that, in determining the requisite two-thirds approval of an order, nothing shall "be construed as limiting representation by cooperative associations" as provided in §608c (12). But that does not preclude the Secretary from defining the eligible "producers" in a given case to include only individual producers, thereby excluding cooperative "producers."

in other words, a necessary equalitarian voting principle implicit in these statutory referenda, a "one man - one vote" or a "one producer - one vote" principle. Compare *Reynolds v. Sims*, 377 U.S. 533 (1964), and related political voting decisions. It is a principle that the Secretary himself has recognized in his regulations (7 Code Fed. Regs. 900.303), which state that "Each producer shall be entitled to only one vote and to cast one ballot in each referendum." And it is a principle that Congress in 1970 made express in adding §608c(5)(B)(v), providing that a separate vote must be taken on proposed price base allocations "in a referendum in which each individual producer shall have one vote."[7]

The statutory problem is how to accommodate the right of individual producers to participate in referenda directly affecting their interests and the right of cooperatives to cast bloc votes on behalf of their producer-members. Such an accommodation would appear to lie within the informed discretion of the Secretary. As the Fourth Circuit said in *United States v. Mills*, 315 F.2d 829, 834 (4th Cir. 1963):

> "But the statute itself contains no definition of 'producer'. Therefore, we think the Secretary has the right to define 'producer', and to fit the qualifications of the producer-voter, according to the proposition on referendum. *H.P. Hood & Sons v. United States*, 307 U.S. 588, 597-598 (1939); *United States v. Wrightwood Dairy Co.*, 127 F.2d 907, 911 (7 Cir., 1942)."

Thus the Secretary could have defined the "producers" eligible to vote on the amendment to Order No. 68 as

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[7] See the Capper-Volstead Act requirement (7 U.S.C. §291) that no member of an agricultural cooperative shall be "allowed more than one vote." And see Minn. Stat. §308.07 (1971), which restricts proxy voting by cooperative members, at least as to the relationship between local and central cooperatives.

those individual producers affected by the amendment, each individual being entitled to cast one vote. Elimination of bloc voting by cooperatives would have been justified in this instance by several considerations: (a) the important impact on individual producers of the proposed extension of federal milk controls; (b) the virtually complete dominance of bloc votes by the two cooperatives and the total immersement of individual views and votes into the cooperatives' notions of the best interests of their members; (c) the elimination through bloc voting of any possibility of an effective adverse vote by one-third or more of the individual producers; and (d) the certainty that the cooperatives' control of 92 percent of the producers' votes would completely pervert the statutory notion that federal milk controls should be extended only with the direct approval of those individual producers affected thereby.

A full exploration of the voting rights of individual producers, as affected by the bloc voting rights of large cooperatives, is worthy of this Court's consideration and determination.

CONCLUSION

For these various reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO. 72-1416

GEORGE BENZ AND SONS,

APPELLANT,

v.

EARL L. BUTZ,
Secretary of Agriculture,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BEFORE MATTHES, CHIEF JUDGE, BRIGHT, CIRCUIT JUDGE, AND TALBOT SMITH*

Submitted: January 12, 1973

Filed: April 20, 1973.

PER CURIAM

This action has been brought by plaintiff, George Benz and Sons (hereafter "Benz") against the Secretary of Agriculture

*Hon. Talbot Smith, Senior United States District Judge, Eastern District of Michigan, sitting by designation.

(hereafter " the Secretary") pursuant to 7 U.S.C. 608c (15) (B).[1] Benz is a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business located in the City of St. Paul, Minnesota. Benz, through its division known as "Oak Grove Dairy", operated a milk processing and bottling plant at Norwood, Carver County, Minnesota, and is thus a "handler" under the Agricultural Marketing Act of 1937, as amended, 7 U.S.C. 601 *et. seq.* (hereinafter "the Act") and under Order No. 68 (7 C.F.R. 1068, 1068.13), hereinafter discussed.

The complaint against the Secretary involves his amendment to Order No. 68, 7 C.F.R. 1068.1 *et. seq.* This order (referred to in the record as the "old order") had been in effect since 1945, its purpose and effect being to regulate the handling of milk in the Minneapolis-St. Paul marketing area. The statutory plan basic to not only this particular order, but milk marketing orders in general, is found in, among other cases, *U.S. v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Zuber v. Allen*,

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1. The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a (6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter instituted pursuant to this subsection (15).

396 U.S. 168 (1969); *U.S. v. Mills*, 315 F.2d 828 (4th Cir. 1963), *cert. denied* 375 U.S. 819 (1963); *U.S. v. Lewes Dairy, Inc.*, 337 F.2d 827 (3rd Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); *Sunny Hills Farm Dairy Co. v. Hardin*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied* 405 U.S. 917 (1972). Reference to the *Rock Royal* case in particular will avoid repetition.

The problem in the Minneapolis-St. Paul marketing area arose from the fact that as people moved from the cities to the suburbs the market of milk moved with them. It was necessary, then, as the Secretary found, to recognize this shift in population and to expand the marketing area in order to insure the orderly marketing of milk.

Handlers of milk who were regulated under the old order were competing with unregulated handlers, resulting in disorderly milk marketing situations.

The plaintiff opposed the expansion in so far as the expanded marketing area included the Minnesota counties west of Minneapolis where Oak Grove sold its products. It was testified that Oak Grove was not subject to regulation under the then-existing Minneapolis-St. Paul marketing order, but that it would become regulated if the proposed expansion were ordered. This it opposed. Following the Administrative hearings and procedures presented under the Act, including a referendum conducted under the Act to determine the approval or disapproval of procedures of milk,[2] it was determined that the contemplated expansion of the marketing area pursuant to the amendatory order was supported by the evidence. It was also held that the evidence established that Oak Grove's milk

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2. 7 U.S.C. § 608c (12)

competed with interstate milk so as to render Oak Grove subject to the Secretary's jurisdiction.[3]

The Administrative remedies open to Benz having been exhausted, this action under the Act was filed. The Government moved for summary judgment, hearings were held thereon and briefs submitted, subsequent to which the District Court granted the motion of the Government.

On this appeal Benz principally urges, as it did to the District Court, that there was insubstantial evidence to support the findings made by the Secretary and, in addition, that the referendum above described was improper, and improperly conducted, violative, among other issues, of "The 'one-man, one-vote' Principle."

Before us counsel complains as well of a hearing conducted by the Court on March 22, 1972. This hearing was called by the Court in view of the fact that after reviewing the records, briefs, and exhibits before it, "the Court has some inquiries to make." (Court's letter of March 14, 1972). Due to a failure of communications, appellant's counsel was not present thereat and complains of its conduct. We find little, actually, that counsel could have added to his previous careful delineation of the issues, even had he been present, and we note, in this regard, the Court's statement, in writing to appellant's counsel, that no evidence was taken and no testimony heard. Moreover, counsel

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3. "The record herein indicates, in part, that a large volume of milk from Wisconsin is regularly received at bottling plants in the Minneapolis-St. Paul metropolitan area where it is intermingled with the milk of Minnesota producers and distributed throughout the expanded marketing area, that regulated handlers distributed such milk in competition with unregulated handlers such as petitioner and that, as indicated above in these Conclusions, unregulated milk, including petitioner's, clearly burdened, obstructed or affected such regulated milk." App. 59-60.

was fully informed on the principal issues discussed, his comments requested thereon, and at no time was a suggestion of reconsideration made. We find no error in the procedure adopted for the limited purpose employed, nor in the permitted intervention therein of certain producers. cf. *Zuber v. Allen, supra,* at 171 (n.1); *Stark v. Wickard,* 321 U.S. 288 (1944); *U.S. v. Rock Royal Co-operative, Inc., supra.*

The issues raised received the careful consideration of Judge Neville in the District Court. We have examined the arguments presented upon the record made and are in full agreement with the decision reached by the District Court, affirming on the basis of that opinion. See Rule 14, Rules of the Eighth Circuit Court of Appeals.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

NOT TO BE PUBLISHED.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 72-1416. September Term, 1972

Geo. Benz & Sons, a Minnesota Corporation,
Appellant,
vs.
Earl L. Butz, Secretary of Agriculture,
Appellee.

) Appeal from the United States District Court for the District of Minnesota.

The Court having considered petition for rehearing *en banc* filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing *en banc* be, and it is hereby, denied.

Considering the petition for rehearing *en banc* as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 15, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

194

(Title of Cause)

ORDER GRANTING SUMMARY JUDGMENT

This is an action brought under 7 U.S.C. § 608c(15)(B), with jurisdiction conferred on this court thereunder and under 7 U.S.C. § 608a(6), to review a decision of the Secretary of Agriculture amending the Minneapolis-St. Paul Milk Marketing Order No. 68 by enlarging its geographical area to include a number of counties in Minnesota contiguous or proximate to the area established circa 1945 when the original milk marketing order was promulgated. Plaintiff was an unregulated milk handler, who had and has its principal place of business outside the original geographical area and has sold less than the minimum quantity of fluid milk within the regulated area but who now finds itself situated in the expanded and regulated area. The applicable statute permits such an aggrieved handler to file "a bill in equity" for review and "If the court determines that such ruling is not in accordance with law it shall remand" with directions or "take such further proceedings as . . . the law requires." It is clear from numerous decisions that the court's function here is not *de novo* but is an appellate one and is limited to a determination as to whether plaintiff received due process and, on the merits, to a determination as to whether or not the order or ruling under review is supported by substantial evidence in the record. *United States v. Mills*, 315 F. 2d 828 (4th Cir.), *cert. denied sub nom.* 375 U.S. 819 (1963); *Ogden Dairy Co. v. Wickard*, 157 F. 2d 445 (7th Cir. 1946), *cert. denied* 330 U.S. 827 (1947).

Plaintiff attacks the Secretary's order on the ground first that there is no substantial evidence to support the expansion

and second that it has been denied due process in that in obtaining the required approval of at least two-thirds of the milk producers in the area as required by 7 U.S.C. § 608c (9) (B)(i), the Secretary through his delegate violated the "one man one vote" rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny and in other ways conducted an illegal referendum. Defendant has moved for summary judgment which motion was argued originally September 14, 1971 and on the court's own invitation re-argued March 22, 1972.

Robert O. Sullivan, Esq., St. Paul, Minnesota, appeared for plaintiff; Victor W. Palmer, Office of the General Counsel, Dept. of Agriculture, Washington, D.C., and Neil J. Shapiro, Esq., Assistant United States Attorney, Minneapolis, Minnesota, appeared for defendant.

To determine whether the Secretary's order is supported by substantial evidence, the court has read the entire three volumes of transcript of the hearing AO 178-A23 of June 25, 1968 before the Department of Agriculture and examined another large volume of exhibits, briefs and proposed findings. The court is satisfied that there was substantial evidence to support the Secretary's findings and order. The field is one of unusual expertise. Many if not most of the arguments advanced against expansion were discussed, together with the reasons therefor, in *United States v. Mills, supra*, where a milk marketing area included the city of Baltimore and a number of adjacent rural counties. The milk marketing act of 1937 has been held constitutional *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), including the provision for a referendum requiring approval of two-thirds of the producers in the area. That case explains the scheme of the milk marketing orders and their operation and this court will not purport to restate such. In the case *sub judice* far more than two-thirds

of the producers approved in a referendum conducted by the Secretary. At the second hearing before this court on the motion for summary judgment the court became aware for the first time that the order covering the enlarged geographical area had actually been in effect for a period of some two and a half years and handlers had been operating thereunder. The court was tempted under 7 U.S.C. § 608c(15)(B) to exercise its power of remand to the Department of Agriculture for the taking of additional evidence to determine how the enlarged plan is in fact operating, rather than rely on prospective evidence based on figures and calculation now nearly five years old predicting then the future effect of enlarging the regulated area. A careful reading of the law, however, and the fact that this is not a *de novo* proceeding has discouraged the court from so doing. The remedy for a dissatisfied handler is found in other sections of the law permitting him to petition the Secretary of Agriculture for a new hearing where up-to-date conditions would be examined. The court, though curious as to how the enlarged plan has been operating, is satisfied that the Secretary's Amending order was based on substantial evidence at the time of the 1968 hearings and should be affirmed and not set aside, nor should any injunction issue.

Plaintiff attacks the referendum on constitutional grounds. 7 U.S.C. § 608c(9) as above stated requires approval of two-thirds of the producers in the area before a milk marketing order or an amendment thereto can be issued and Section 608c(12) provides in part:

> ". . . the Secretary shall consider the approval or disapproval by any cooperative association of producers . . . as the approval or disapproval of the producers who are members of, stockholders in or under contract with such cooperative association of producers."

Cooperatives Land O'Lakes and Twin City Milk Producers Association voted for their producer members in the referendum. Plaintiff asserts that this violates the one man one vote rule and further is contrary to and in violation of Minn. Stat. § 308.07 Subd. 3. Preliminarily it should be observed that there can be no complaint that some 542 producers within the original geographical area were entitled to and did vote in the referendum *Freeman v. Hygeia Dairy Co.*, 326 F. 2d 271 (5th Cir. 1964); *Benson v. Schofield*, 236 F. 2d 719 (D.C. Cir. 1956). The claim that votes of the 542 producers were duplicated in that they were cast by both Land O'Lakes and Twin City Milk Producers Association is gainsaid by the affidavit of the Market Administrator who conducted the referendum that he was alert to this and checked the voting against each individual member's name and counted only one vote for each eligible voter thereby eliminating any possible duplication. There was no evidence to the contrary.

Even were there a duplication, it is without prejudice or harm to plaintiff for the total vote for approval was 4,202 with 143 against. Eliminating these 542 or even adding them to the 143, there still remains a vote for approval in excess of two-thirds of all producers voting or of an estimated 4,569 producers eligible to vote.

The "one man one vote" challenge to the constitutionality of the two-thirds requirement is without merit. In the first place, plaintiff's producers, if they voted, presumably voted against the approval. Query whether they or plaintiff have standing to object even were the statute faulty. It is the voter who votes with the majority but where the majority is less than two-thirds who may complain that his vote is wasted, dissipated or doesn't count. One who is in the minority, whether it be a minority of 49% or 10% has no grievance in that

his vote counted fully in any event and being in the minority there was and is nothing about which he can complain. In fact one voting against had added voting strength. Be that as it may, it is quite clear that a handler in plaintiff's position cannot claim to represent its producers or acquire standing through them, but is limited to seeking redress for actual harm, if any, to it. *Queensboro Farm Products Inc. v. Wickard*, 137 F. 2d 969 (2d Cir. 1943). Further, it seems clear to the court that the one man one vote rule under *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, *supra*, and other cases, is designed more to protect the civil rights of individuals and not the regulation of an industry from an economic point of view. The Agriculture Marketing Act is designed to assure orderly marketing conditions and Congress was perfectly within its province in requiring more than a majority vote before an agreement or marketing order which would affect producers and require their support, could be put into effect. Actually in recent years many statutes requiring more than a majority vote have been upheld. *Brenner v. School District of Kansas City, Mo.*, 315 F. Supp. 627 (W.D. Mo. 1970) (three judge court upheld requirement of two-thirds vote for school bonds); *Bogert v. Kinzer*, 93 Idaho 515, 465 P. 2d 639 (same); *Adams v. Ft. Madison Community School Dist.*, 182 N.W. 2d 132 (Iowa 1970) (60% requirement for bonds upheld). Though there were cases to the contrary, *Gordon v. Lance*, 403 U.S. 1 (1971), upheld a requirement of a 60% vote for the approval of public bonded indebtedness, settling this question. See also language in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Plaintiff further attempts to rely on Minn. Stat. § 308.07 which restricts proxy voting by members of a cooperative association. The statute in fact refers to the relationship between local and central cooperatives, but apart from this, it

is clear and needs no elaborate citation of authority for the proposition that where the Federal government has preempted the field, acts of Congress prevail over state law as to matters on which Congress has legislated—which it has done in this case by providing a cooperative may cast votes for its producer members.

It thus appears that the issues involved are purely legal and there is no material question of fact for decision by the court.

Accordingly,

IT IS ORDERED That defendant's motion for a summary judgment be, and the same hereby is granted and plaintiff's complaint be and hereby is dismissed.

PHILIP NEVILLE
United States District Judge

Dated: April 24, 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE BENZ AND SONS, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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1. Petitioner, the operator of a dairy in Norwood, Minnesota (Pet. 5), presents three challenges to the conduct of a 1969 referendum by which milk producers in portions of Minnesota and Wisconsin approved an amendment to the Minneapolis-St. Paul milk marketing order (7 C.F.R. 1068), enlarging the marketing area regulated by the order so as to include petitioner's dairy (Pet. 6).[1] Following a public hearing at which petitioner opposed the proposed expansion of the marketing area, the Department of Agriculture decided

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[1] The marketing order was issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.* The operation of this statute is described in *Zuber* v. *Allen*, 396 U.S. 168, and *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533.

to amend the marketing order if at least two-thirds of the producers of milk for sale in the proposed marketing area approved the amendment by referendum. 34 Fed. Reg. 3833. Of the 4,345 votes cast in the referendum, 4,202 or 96.7 percent approved the amendment (Pet. 7-8). Accordingly, the amended order became effective May 1, 1969 (Pet. 8).

Petitioner then filed an administrative petition pursuant to 7 U.S.C. 608c(15)(A) challenging, *inter alia*, the conduct of the referendum. When this petition was dismissed, petitioner commenced this action pursuant to 7 U.S.C. 608c(15)(B) seeking to set aside the amendatory order. The district court granted summary judgment for the Secretary of Agriculture (Pet. App. 25-30), and the court of appeals affirmed (Pet. App. 19-23).

2. The decisions of the courts below are in accord with the applicable statute and relevant precedents, and review by this Court is unwarranted.

Petitioner first questions the statutory authority for conducting a referendum of the type in issue here, *i.e.*, a referendum upon a proposed amendment which would enlarge the geographic area regulated by an existing milk marketing order (Pet. 10-12). The authority for such a referendum is 7 U.S.C. 608c(19),[2] which

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[2] At the time the referendum was held, that Section provided:

> For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or

provides that a producers' referendum shall be conducted for initial marketing orders and may be conducted for amendatory orders. As petitioner indicates (Pet. 11), Section 608c(19) does not specifically refer to amendments affecting the size of the area regulated, but there is no basis for implying any exception for this particular type of amendatory order. Moreover, the Secretary's authority to conduct a referendum upon such amendments and his authority to change by amendment the geographic area regulated by an existing marketing order is established. See *Freeman* v. *Hygeia Dairy Co.*, 326 F. 2d 271 (C.A. 5); *Benson* v. *Schofield*, 236 F. 2d 719 (C.A. D.C.), certiorari denied, 352 U.S. 976.

Secondly, petitioner raises the issue whether voting in the referendum should have been restricted to those producers who were not regulated under the old order but would become regulated if the proposed expansion was approved (Pet. 12-15). In the actual referendum, producers from the entire proposed marketing area, including the area already regulated, were eligible to vote (Pet. 7-8).[3] This class of voters was proper in

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the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

A 1972 amendment to this section, 86 Stat. 780, added a provision applicable to pears that is irrelevant to the present dispute.

[3] Petitioner is a "handler" not a producer, so it was ineligible to vote (Pet. 5; Pet. App. 28-29).

light of the statutory requirement that, prior to issuing a marketing order, the Secretary must determine that it is approved by at least two-thirds of the producers engaged in the production of milk for sale in the marketing area. 7 U.S.C. 608c(9)(B); *H. P. Hood & Sons, Inc.* v. *United States,* 307 U.S. 588, 598. The other courts of appeals that have considered this issue have specifically rejected petitioner's contention. *Freeman* v. *Hygeia Dairy Co., supra; Benson* v. *Schofield, supra.*[4]

Finally, petitioner questions the form of the ballot and the fact that two cooperatives voted as blocs on behalf of their members (Pet. 15-18). Section 608c(19) (quoted *supra,* n. 2) resolves both questions. The question on the ballot was, "Do you approve the issuance by the Secretary of Agriculture of the order as amended, regulating the handling of milk in the Minneapolis-St. Paul, Minnesota, marketing area?" (Pet. 7). Petitioner asserts (Pet. 15) that this ballot violated the statute and regulations because it failed to describe adequately the terms of the proposed amendment. Section 608c(19), however, states that the "nature, content, or extent of such description" on the ballot of the terms and conditions of the proposed order "shall not be a basis for attacking the legality of the order or any action relating thereto."

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[4] The court of appeals found that the amendatory order was necessitated by the fact that as population moved from the cities to the suburbs, the marketing of milk also moved, and "[h]andlers of milk who were regulated under the old order were competing with unregulated handlers, resulting in disorderly milk marketing situations" (Pet. App. 21). Thus, although the amendatory order would not alter the regulated status of handlers located in the original marketing area, such handlers were "affected" by the order, contrary to petitioner's assertions.

Sections 608c(19) and 608c(12) also provide for bloc voting by cooperatives, as occurred in the referendum here. This Court has upheld bloc voting by milk cooperatives even when their bloc constituted nearly two-thirds of the total votes cast so that the cooperatives effectively controlled the outcome of the referendum. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 557, 559-560, 578; see also, *H. P. Hood & Sons, Inc.* v. *United States, supra*, 307 U.S. at 597-599. Thus, petitioner's challenges to the conduct of the referendum in the present case are without merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.